SUPREME COURT, U. S.

JUL 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1958

MOHASCO INDUSTRIES, INC., *et al.*,
Petitioners

v.

ACME FAST FREIGHT, INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 1, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 1, 1974.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, sustaining respondent's motion to dismiss petitioners' action for restitution is printed in Appendix A hereto but is not recorded in the official reports. The opinion of the Court of Appeals, which affirmed dismissal of the complaint, is printed in Appendix B hereto and is reported at 491 Fed.2nd 1082.

JURISDICTION

The judgement of the Court of Appeals printed in Appendix B hereto was made and entered on April 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Does the decision of this Court in *T.I.M.E., Inc.* v. *U. S.*, 359 U.S. 464 (1959) bar a remedy in restitution to interstate shippers of freight by motor vehicle for excessive and unlawful charges, where the omission of post-shipment relief from the Motor Carrier Act[1] (and inclusion of such relief in other parts of the Interstate Commerce Act) had led this Court to conclude that Congress meant to deny motor carrier shippers continued access to pre-existing common law rights to retrospective relief, and that omission has since been rectified?

(2) Is the right to "reparation" conferred by the 1965 amendment to the Motor Carrier Act a "sole and exclusive" remedy despite the savings clause in Section 216(j) preserving consistent remedies and the existence of a compatible judicial remedy better suited to the needs and circumstances of injured shippers?

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Motor Carrier Act (49 U.S.C. 301 *et seq.*) are set forth in Appendix C hereto.

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[1] The Interstate Commerce Act is set forth in Title 49 USC, §§ 1 *et seq.* Part II of the Act, sometimes called the Motor Carrier Act, is numbered §§ 201 *et seq.* in its text, but is designated §§ 301 *et seq.* in Title 49 USC. We shall herein refer to sections of the Act according to numeration in the *text* of the Act.

STATEMENT

Petitioners are related corporations (Mohasco Industries, Inc., and three of its subsidiaries) engaged in the manufacture and distribution of furniture. Respondents are motor common carriers engaged in the transportation of various goods, including furniture, from and to various points and places including petitioners' shipping and receiving points.

In January, 1968, respondent motor carriers filed tariffs with the Interstate Commerce Commission (ICC) increasing the charges applicable to furniture by 18% to 200% (average about 50%). Various furniture shippers, including petitioners, filed protests and the ICC, in response to those protests, instituted an investigation to determine whether the proposed increases resulted in "charges . . . that are unjust and unreasonable". Three years later, after respondents had lost every interim decision and exhausted every available administrative appeal, the ICC issued its final report in *Classification Ratings on Furniture* 337 ICC 709 (1970),[2] confirming the prior condemnations of the increased charges by a hearing examiner, a review board, and a division of the ICC, and ordering respondent motor carriers "to cancel the tariff schedules . . . on or before December 18, 1970" (see Appendix D, page 35a).

During the three years it took to resolve the ICC investigation, petitioners had paid respondent motor carriers the charges accruing under the legally applicable tariffs ultimately found unlawful by the ICC. Such charges exceeded, by more than $172,000, those due under the pre-existing lawful tariffs reinstated, by ICC order, on December 18, 1970. While an action at law for "reparations" could have been instituted under Section 204a of

[2] The ICC report and order is printed in Appendix D hereto.

the Motor Carrier Act as amended in 1965, that remedy was then outlawed for about one-third of the unlawful collections by reason of its two year limitation (§ 204a (2)). Moreover, the ICC in a June, 1970, order,[3] had directed its staff to advise shippers that "the true basis of the shippers' right to a refund [of excess motor carrier collections under tariffs ultimately condemned by the ICC] is their common law remedy for restitution". A U. S. Court of Appeals had seemingly confirmed this advice by sustaining a restitution action in comparable circumstances where, as here, the excessive charges which could have been the subject of an action under Section 204a had already been condemned by the ICC after going "through the proper agency channels" *Middlewest Motor Freight Bureau* v. *United States*, 433 Fed.2d 212, 235-6 (1970). Accordingly, petitioners elected to pursue the restitution remedy available under common law[4] and preserved by Section 216(j) of the Motor Carrier Act, which provides:

> Nothing in this section shall be held to extinguish any remedy or right not inconsistent herewith.

Petitioners made written demands upon motor carrier respondents for repayment of the unlawful portion of interim collections within a year of the ICC's order which had found them to be excessive. Upon refusal of those

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[3] The order was issued in connection with another case where interim collections had been made under tariffs subsequently declared unlawful in the ICC decision reviewed in *Admiral Merchants Motor Freight, Inc.* v. *U.S.* 321 Fed. Supp. 353. The order is quoted in its entirety at pp. 25-26 of Respondents' August 13, 1973, brief to the court below.

[4] *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436 (1907), *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370, 383 (1931), *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 135 (1919), *Baltimore & O.R.* v. *United States*, 279 U.S. 781, 786 (1928), and *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301, 309 (1935). See also dissenting opinion of Justice Black in *T.I.M.E.*, 359 U.S. at p. 480.

demands, petitioners filed a complaint in the United States District Court of the Southern District of Mississippi, Jackson Division, on May 12, 1972, seeking restitution of the excessive charges retained by respondent motor carriers.

Jurisdiction of the U. S. District Court was based on the amount in controversy[5] and on diversity of citizenship (28 U.S.C. 1332(a)) and, alternatively, on the existence of a Federal question arising under an Act of Congress regulating commerce (28 U.S.C. 2337).

The motor carrier respondents moved for dismissal, claiming that the *T.I.M.E.* decision barred any post-shipment relief to interstate shippers by motor vehicle, citing a decision of another United States District Court which had sustained the same motion by the same counsel on the same grounds in an action arising out of the same ICC order. *U. S.* v. *Associated Transport, Inc.*, 347 Fed.Supp. 650 (D.D.C. 1972). The motion was granted in the district court's decision which did little more than recite agreement with the conclusion and reasoning in *Associated.* Both rulings were appealed, this case to Fifth Circuit, and the *Associated* case to the Circuit Court of Appeals for the District of Columbia. The latter appeal is still pending. The Fifth Circuit, in this case, affirmed the dismissal on two primary grounds, i.e.:

> (1) ". . . from and after the decision in *T.I.M.E.*, unless Congress by statute should direct to the contrary, the shipper had no remedy in the courts on

[5] The claims against 4 (of the 16) defendants exceed $10,000 for each such defendant and aggregate $143,216.55, out of a total $172,258.94. Claims against the remaining 12 fall below the $10,000 figure by varying amounts, and aggregate $29,042.39. All 16 defendants were joined in this action pursuant to Rule 20 of the Federal Rules of Civil Procedure as interpreted in *Anderson* v. *Francis DuPont and Company*, 291 F Supp 705 (DC, Minn. 1968) and in *F.C. Stiles Contracting Company* v. *Home Insurance Company*, 431 Fed 2d 917, 919-20 (CA 6, 1971).

common law principles by which he could sue, after the fact, for the restitution of charges . . ." and

(2) ". . . [subsequent] enactments would provide the sole and exclusive remedy for excessive charges . . . [and the 1965 amendment to Section 204a] did not alter or expand the "savings clause", 49 U.S.C. Section 316 (j)". (Appendix B, pp. 14a-15a)

In so ruling, the court below noted decisions in other circuits which "indicate the existence of an organized move to have *T.I.M.E.* reversed", but said the "trouble" with arguments based on those decisions is that none "were decisions of the Supreme Court of the United States". The court concluded:

> If that is to happen [i.e., if *T.I.M.E.* is to be reversed] it will have to be done by the Supreme Court, not by any of the inferior courts (Appendix B, page 16a).

REASONS FOR GRANTING THE WRIT

(1) The decision below accepts, as a dispositive and binding precedent, a fifteen year old decision of this Court, which it acknowledges has been eroded by subsequent decisions of other circuits indicating, in the court's phrase, "the existence of an organized move to have *T.I.M.E.* reversed". The decision below fails to acknowledge that *T.I.M.E.*'s erosion is accounted for not so much by a change in judicial attitude as by a change in the legislative framework bearing directly upon the Congressional policy towards retrospective relief to interstate shippers by motor carrier. Justice Harlan, speaking for the majority in *T.I.M.E.*, had said:

> The question is, of course, one of statutory intent. We do not think that Congress . . . intended by the savings clause of Section 216 (j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparation provisions

> in the Motor Carrier Act would be to require the shipper in effect to bring two law suits instead of one . . . (359 U.S. at page 474)

By its subsequent action, Congress plainly indicated that the majority report in *T.I.M.E.* had misconceived its intent. The 1965 amendment to Section 204a was designed expressly "to sanction a procedure" which *T.I.M.E.* did not think Congress intended. It "restored a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case . . ." (H. Rep. No. 253 on H. R. 5401, U. S. Code cong. and adm. news 1965, p. 2931) Judge Friendly paraphrased the legislative intent of the 1965 amendment in *McFadden Express, Inc.* v. *Adley Corp.*, 363 Fed.2nd 546 (CA2 1966):

> The Commission and the committee reports justified the reparations amendment [to Section 204a] as correcting what was thought to be an erroneous decision in the T.I.M.E. case . . . (363 Fed.2nd at 549)

Congress thus restored shippers to the position they had occupied prior to this Court's decision in *T.I.M.E.*—a position which the court below described thus:

> Until 1959 many considered that this common law right of recovery had survived the enactment of Part II of the Interstate Commerce Act by reason of its "savings clause", 49 U.S.C. § 316(j); Barrows Porcelain and Enamel Company v. Cushman Motor Delivery Company, 1939 11 M.C.C. 365; Bell Potato Chip Company v. Aberdeen Truckline, 1944, 43 M.C.C. 337.

The court below acknowledges that *T.I.M.E.* was a 5-4 decision and that this Court reached a seemingly contrary result three years later in *Hewitt-Robins* v. *Eastern Freight-Ways*, 371 U.S. 84 (1962) where, significantly, it favorably cited (at p. 89) the *Bell Potato Chip* case which the court below says "fell prey to a total re-

versal" in *T.I.M.E.* (Appendix B, page 13a). The court below emphasizes that the majority in *Hewitt-Robins* was at "great pains" to assert that it was distinguishing, not reversing, *T.I.M.E.* (See, nonetheless, Justice Harlan's dissent insisting that the *Hewitt-Robins* majority decision did reverse the decision he wrote in *T.I.M.E.* and that, in his words, the *T.I.M.E.* decision "plainly controls this one." 371 U.S. at page 89) But the court below ignores the fact that the Motor Carrier Act, as constituted when both *T.I.M.E.* and *Hewitt-Robins* were decided, differed from its present form in a manner directly related to the legislative intent sought to be implemented (somewhat diversely) in those decisions.

Justice Harlan's 1959 inquiry in *T.I.M.E.* was directed to whether the Section 216 (j) "savings clause" could provide indirect retrospective relief where the Motor Carrier Act, as then uniquely constituted, omitted any *direct* retrospective relief to shippers by motor vehicle. The savings clause preserved only remedies consistent with the structure of the Motor Carrier Act, and Justice Harlan found restitution inconsistent with what he regarded as a deliberate Congressional omission of any specific retrospective relief against motor carriers. Since the 1965 amendment to the Act, the appropriate inquiry has to be: Can the savings clause be regarded as preserving a *different* and (in present circumstances) a more fitting retrospective remedy than Congress has now directly incorporated into the Act? Obviously, the *T.I.M.E.* Court could not have answered this question, since the directly incorporated retrospective relief was not then a part of the Act. The court below had the question pending before it, but answered it incorrectly. Its conclusion, that the statutory remedy in reparation is a "sole and exclusive" remedy, is set forth *ipse dixit*, i.e., without supportive reasoning other than the statement that it "necessarily follows" from the *T.I.M.E.* decision. The Eighth Circuit,

in *Middlewest*, reached the opposite conclusion in circumstances not materially different insofar as concerns the exclusiveness of the remedy, and provided a detailed and cogent rationale for its decision, which rationale is not logically tied to its peculiar facts and can not, therefore, be limited to them.

(2) The decision below concludes that the 1965 "reparations" amendment to the Motor Carrier Act provides "the sole and exclusive remedy for excessive charges". It dismisses as factually "inapposite", the decision of the Eighth Circuit in *Middlewest Motor Freight Bureau* v. *United States*, 433 Fed.2nd 212 (1971), cert. denied 402 U.S. 999 (1971), where the opposite conclusion had been reached with respect to the same 1965 amendment:

> We conclude that the principles of *T.I.M.E.* do not preclude restitution in this case, nor is Section 204a an exclusive remedy (433 Fed.2nd at p. 236).

These are plainly contradictory readings of the same statutory language, and the contradiction is not belied or explained by noting the different relief sought by aggrieved shippers in *Middlewest* and in the present case. *Middlewest* did not, of course, present or decide the same question presented here, i.e., whether shippers are entitled to retrospective relief for interim collections under unjustified motor carrier tariffs legally applicable to freight moved in the period *prior* to the ICC's final order. Nonetheless, the *Middlewest* rationale is, in large degree, extraneous to the time frame of the shipper's request for restitution of unlawful charges. Its conclusion that the restitution remedy survives under the 216(j) "savings" clause despite (or, in a sense, because of[6]) a di-

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[6] *T.I.M.E.* found a Congressional policy against *any* retrospective relief in the omission of a specific "reparation" remedy coupled with the provision of such a remedy in the parts of the Interstate Commerce Act dealing with other carrier modes. The subsequent extension of such a specific reparations remedy into the Motor Carrier Act destroyed this "negative pregnant".

rectly provided statutory remedy in "reparations" is logically unconnected to that time frame.

The fact is that the *Middlewest* court simply and expressly refrained from deciding whether the shippers before it had the right to claim for excessive charges paid in the period prior to a final order by the ICC, because that claim was not presented to it and was "not before us in this case" (433 Fed.2nd at p. 222). The fact that its decision was, accordingly, limited to the issues before it plainly does not negate its precedent value so far as concerns its reasoning and conclusions on other issues presented there and here—most particularly the exclusive remedy issue. It was, for example, cited and relied upon in *Admiral Merchants Motor Freight, Inc.* v. *U.S.*, 321 Fed. Supp. 353 (D. Colo. 1971) aff'd *sub nom* 404 U.S. 302 (1971), where the shippers' claim did relate to excessive charges collected prior to the ICC's final order of condemnation. In sustaining the shippers' claim in the peculiar circumstances before it, which were acknowledged to be different than those in *Middlewest*, the court in *Admiral Merchants* said:

> Although the Court of Appeals, requiring restitution in that case, viewed the power of the court to order restitution as concomitant with the traditional equity powers of the court to issue injunctions, it also held a rate that is not shown to be just and unreasonable to be unlawful, at least from the time the Commission orders it cancelled (321 Fed. Supp. at p. 360).

To observe that *Middlewest's* facts are not entirely apposite does not require the observer to disregard or reject that portion of its rationale which fits the present circumstances. Thus, unless or until this Court relieves the apparent discrepancy in the conclusions expressed in these two appellate decisions, shippers and carriers and the federal agency which administers the Act regulating

their business interrelationships will be left to choose between their conflicting implications as best they can.

(3) The issue raised in this case and incorrectly resolved in the court below vitally concerns the rights of interstate motor carrier shippers, who, on an increasing basis in recent years, have been required to pay proposed increases running to millions of dollars for freight carried during all or most of the period in which the lawfulness of those proposals is being determined by the ICC. Where, as in the present case, the decisional process consumes more time than the period of limitations provided in the 1965 "reparation" amendment, the shipper is left without any relief at all under the lower court's determination that the reparations remedy is "sole and exclusive".[7] The ICC, which has (under § 216(g)) the specific discretion to suspend rate changes (for seven months) and the general administrative discretion to manage the time required for decision (and thus to limit or expand interim collections under tariffs which may be found unlawful) holds the view that shippers have the right to restitution in the event that it finds the interim collections unlawful. In the *Associated* case (*supra*) where the government (as shipper) seeks restitution under identical circumstances, the position of the ICC is reported thus:

> The Interstate Commerce Commission, although not a party to this action, is fully in accord with the position taken here, and in our main brief. The Commission advised the Department of Justice in connection with the appeal of this case that in its view the remedy of restitution survived the passage of the Motor Carrier Act, and that allowance of the remedy would further the purposes of the act. (Foot-

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[7] While shippers could, theoretically, preserve their rights by filing an action at law seeking reparation under § 204a in the event that interim charges are subsequently condemned in a pending in-

note 5, page 3 of Justice Department Brief in case 72-1946 *U.S.* v. *Associated Transport, Inc.*)

If the ICC is wrong in this view, it should be apprised of the error in unequivocal terms, so that it can manage its administrative function in the certain knowledge of the consequences of delay in resolving these investigations and properly advise inquiring shippers of their rights.

The questions presented by this case are of vital and continuing importance to interstate shippers and carriers. The answers should not be left to guesswork or reasoned surmise. The court below acknowledges uncertainty in announcing one view and the federal agency which passes upon the lawfulness of the involved motor carrier charges holds a different view. The Eighth and Fifth Circuits have reached diametrically opposed conclusions with respect to the exclusiveness of the 1965 "reparations" remedy. The existing uncertainty can only be resolved through a definitive ruling by this Court.

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vestigation, such protective suits would clog the dockets of both courts and the ICC and are for that and other good reasons, not to be encouraged. *Crown Coat Front Co.* v. *U.S.*, 386 U.S. 503, 515 (1967).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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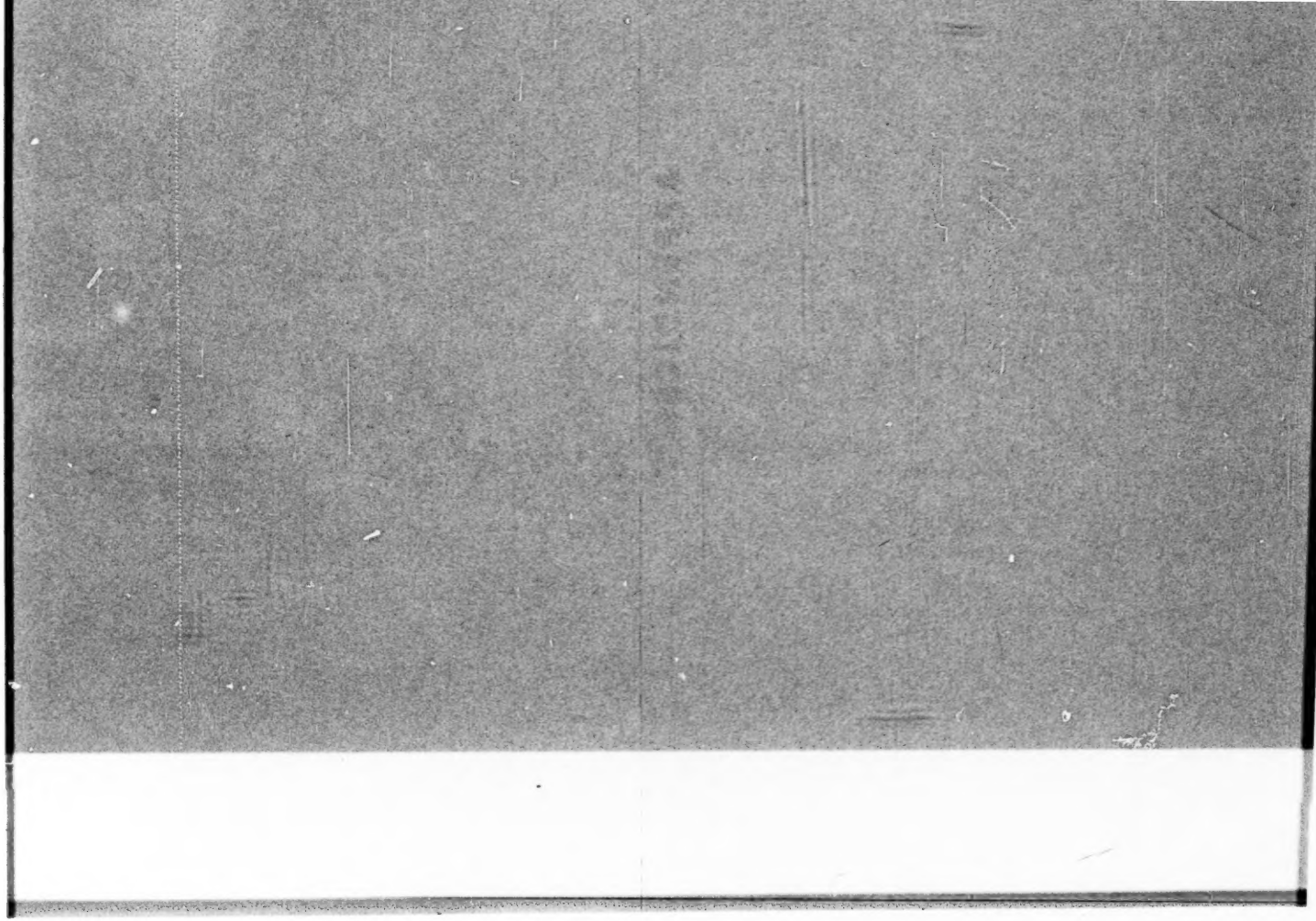

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

OPINION SUSTAINING MOTION TO DISMISS

On May 12, 1972, Mohasco Industries, Inc., and three subsidiary corporations, all incorporated in the State of New York, filed their action against sixteen motor carriers, at least five of which are residents of the State of Mississippi, seeking restitution of certain tariff rate payments plaintiffs made between January 1, 1968 and December 18, 1970, limited to the excess between the rates existing prior to January 1, 1968 and the proposed rates which were cancelled by the Interstate Commerce Commission, effective December 18, 1970.[1] The total amount claimed is $172,258.94, but only four defendants are each charged with an amount in excess of $10,000.00.

Jurisdiction is founded on diversity of citizenship and the requisite amount in controversy under 28 U.S.C. #1332, and, alternatively, on the existence of a federal question in that the matter involves an Interstate Commerce Commission order and arises under an Act of Congress regulating commerce, 28 U.S.C. #1337. No issue as to venue has been posed.

Plaintiffs charge that defendants, through their agent, published and filed with the I.C.C. new tariffs on less than truckload shipments of various kinds of furniture, effective January 1, 1968. Shortly prior to the effective date, and in response to shipper protests, including at least one of the plaintiffs, I.C.C. began an investigation of the proposed tariffs which remained in effect

[1] A footnote in defendants' brief indicates the correct interval is January 16, 1968 to December 18, 1970.

during the period of investigation, no stay order having been issued by I.C.C. By order, effective December 18, 1970, I.C.C. required defendants to cancel the increased charges upon the ground that the carriers had failed to meet their statutory burden showing that the new rates were just and reasonable." The carriers made no appeal from this order and complied with the cancellation. Plaintiffs claim that the new rates increased, by fifty percent or more, the charges applicable, which plaintiffs paid during the nearly three year I.C.C. investigation, and that they are entitled to restitution of the increase. Plaintiffs equate "not shown to be just and reasonable" with unlawful, and, the proposed tariffs being unlawful, the only lawful rates were those in effect prior to January 1, 1968. Plaintiffs rely on the reasoning in *Middlewest Motor Freight Bureau, et al* v. *United States of America*, 433 F. 2d 212, and *Admiral-Merchants Motor Freight, Inc. et al* v. *U.S.A. and I.C.C.* 321 F. Supp. 353, and cases stemming therefrom. All defendants, except Acme Fast Freight, Inc., have appeared and filed a motion to dismiss on the grounds that the complaint fails to state a claim against defendants upon which relief can be granted.

Pre-hearing briefs, as well as post-hearing briefs have been furnished the court after oral argument. At the hearing the Court raised questions as to its jurisdiction, responses to this issue being included in the post-hearing briefs.

As to jurisdiction, plaintiffs claim that, under F.R.C.P. Rule 20, diversity of citizenship being present, and, as claims against four of the defendants each exceed the jurisdictional amount, they are permitted to join all defendants in one action for the purpose of promotion trial convenience and in avoidance of multiple lawsuits. Defendants claim that where there are four plaintiffs, each having a separate corporate identity, it is es-

sential that the demand of each be of the requisite jurisdictional amount, citing *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, at 40-41, and further from *Eagle Star Insurance Co.* v. *Maltes*, 313 F. 2d 778, wherein the Fifth Circuit Court of Appeals held:

"Thus the Supreme Court has evinced a desire to give a strict construction to allegations of the jurisdictional amount in controversy, so as to allow aggregation only in those situations where there is not only a common fund from which the plaintiffs seek relief, but where the plaintiffs also have a joint interest in that fund, such that if plaintiffs' rights are not affected by the rights of co-plaintiffs then there can be no aggregation. . . . In other words, the obligation to the plaintiffs must be a joint one."

Defendants claim that it does not appear from the complaint that the claim of any one plaintiff against any one defendant exceeds the jurisdictional amount, and that obviously there is no joint obligation. The Court is not sure that it can accept this argument. The complaint reveals that all four plaintiffs claim the sum of $72,-477.02 against defendant Merchants Truck Line and the sum of $40,891.96 against Beard Truck Line. Obviously, at least one or more plaintiffs has a claim against either of those defendants in excess of the statutory minimum, and, as to those plaintiffs, diversity jurisdiction is established. The Court would be reluctant, however, even if the pleadings are reformed by setting out the claim of each plaintiff separately, to consider the remaining claims under pendent jurisdiction.

As to jurisdiction under 28 U.S.C. #1337, plaintiffs concede that their action is a common law claim for restitution under the savings clause of Section 216(j) of the Interstate Commerce Act, 28 U.S.C. #316(j). As pointed out by defendants in *Bela Seating Co., et al* v. *Advance*

Transportation Co., et al., 344 F. Supp. 854, a district court held that it would possess no jurisdiction over a common law restitution action brought by shippers for refund of certain freight charges from motor carriers, where neither diversity of citizenship nor the jurisdictional amount was pleaded. Also see *Pensick & Gordon, Inc.* v. *California Motor Express*, 323 F. 2d 769, wherein the court restricted further proceedings, grounded solely in common law rights, to the plaintiff and those defendants as to whom there was the requisite diversity.

Although the Court has doubts over its diversity jurisdiction as claimed in the present form of the complaint, it has no doubt but that the action should be dismissed for failure to state a claim upon which relief can be granted. In support of its motion to dismiss, defendants rely primarily on a district court decision of May 12, 1972, in *U.S.A.* v. *Associated Transport, Inc., et al.*, 347 F. Supp. 650, which involved an action by the government to recover an increase in the freight charges defendants assessed, and the U. S. paid, for transportation of furniture in interstate commerce at various times between May 6, 1969 and December 18, 1970. A motion to dismiss was granted. As in the case sub judice, protests against the increases were filed with I.C.C. and it was requested to exercise its authority under Section 216(g) of the Act to suspend the effectiveness of the increases and make a formal investigation of their reasonableness. As here, I.C.C. refused to suspend the increase and permitted the rates to become effective January 16, 1968. As a result of its investigation and hearing, I.C.C., on November 17, 1970, found that the changed classifications on furniture were "not shown to be just and reasonable" and ordered their cancellation on or before December 18, 1970 with which order of cancellation the carriers complied, re-instating the tariffs that had been in effect prior to January 16, 1968. In that

case, as plaintiffs claim here, plaintiff claimed that the finding that the increased ratings were "not shown to be just and reasonable" means that they were never lawful and therefore plaintiff was entitled to restitution. In that case, plaintiff, as do plaintiffs here, relied on *Middlewest Motor Freight Bureau, et al* v. *U.S.*, 433 F. 2d 212. The Court in Associate carefully analyzed the Middlewest decision, and found that it did not support plaintiff's claim. Middlewest allowed a recovery for only that portion of the time that the I.C.C.'s cancellation order was under a court-ordered temporary suspension, and the court in Associate found that language in Middlewest otherwise supported the contentions of the defendant. In Associate, the court ruled that it could not grant recovery of that part of the freight charges collected by the defendant from January 1, 1968 to December 18, 1970, which exceeded the prior rates absent a finding by the I.C.C. that the excess was unjust and reasonable and a *further findings as to what rates would have been just and reasonable* during the interval. This Court agrees with the decision in Associate and its interpretation of the limited relief allowed in Middlewest. In Middlewest, the appellate court was confronted with whether a rate that is not shown to be just and reasonable is lawful, and concluded that it was. However the appellate court was quick to specifically point out that this conclusion did not imply that the tariffs were unlawful prior to the I.C.C. final order of cancellation, as that issue was not before the appellate court. Restitution in Middlewest, as stated above, was ordered for only the period the cancellation order was temporarily restrained by a lower court.

Plaintiffs, here, also rely on *Admiral-Merchants Motor Freight, Inc.* v. *U.S.*, 321 F. Supp. 353, aff'd without opinion, 404 U.S. 802, reh. den. 404 U.S. 987, and cases stemming therefrom, such as *U.S.A.* v. *Burlington Truck*

Line, Inc., Cause No. 19, 359-4, D.C. of Mo., Western Division, March 1, 1973, and *The Procter and Gamble Company, et al* v. *Byers Transportation Company, Inc., et al*, Cause No. 18,829-4, D.C. of Mo., Western Division, February 22, 1973. In Admiral-Merchants, motor carriers sought a review of a decision and order of I.C.C. cancelling increased tariffs. The increased rates became effective on April 1, 1968. Following protests, the I.C.C. ordered an investigation but did not suspend the new rate schedule. Prior to a hearing, respondents thereto, including plaintiffs seeking the judicial review, requested a 90 day delay in the hearing. In response, the I.C.C. issued an order postponing the hearing, conditioned upon respondents' refunding the increased tariffs to the extent that the increases or any portion of them were not approved. On June 5, 1969, I.C.C. found that the increased rates were "not shown to be just and reasonable," and further ordered that the respondents refund the increased amounts as earlier ordered. The three-judge court found that the refund requirement in return for a postponement of the hearing was a procedural matter, saying: "But in the present case the Commission did not undertake to apply substantive common law or equity principles. The matter with which it was concerned, that is the granting of an extension of time, was pure procedural." The Court affirmed the order, additionally finding that the respondents were estopped from complaining about the order when they evidenced willingness to go along with the condition imposed, and that the respondents also waived any objection to it. This decision was affirmed by the Supreme Court without an opinion, and a petition for a rehearing was denied. Two cases referred to above, stemming from this decision, hold that the decision in Admiral-Merchants is res judicata to the defendants in those cases. Clearly, Admiral-Merchants and the decisions growing out of it are not applicable here. Accordingly, the Court finds that the

motion to dismiss should be granted as to all defendants, including Acme Freight, without prejudice to the plaintiffs.

An appropriate order may be submitted with costs assessed to plaintiffs.

DAN M. RUSSELL, JR.
United States District Judge

Dated: 19 April 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 72J-92(R)

ORDER SUSTAINING MOTION TO DISMISS

This cause having come on for hearing on motion to dismiss filed by Arkansas-Best Freight System, Inc., Beard Truck Line, Clark Truck Line, Crouch Bros., Inc., East Express, Inc., Hennis Freight Lines, Inc., McLean Trucking, Merchants Truck Line, Pacific Intermountain Express, Pic-Walsh Freight Co., Robinson Truck Line, Shumpert Truck Line, Spector Freight System, Inc., Springmeier Shipping Company, and Universal Carloading & Distributing Co., Inc., they being all of the defendants named in the complaint except Acme Fast Freight, Inc., and the Court, after having heard and considered the motion to dismiss filed by said defendants, including oral arguments of counsel and written briefs filed herein, is of the opinion that said motion to dismiss should be sustained as set forth in the Court's written opinion dated April 19, 1973, which opinion of the Court is hereby specifically referred to and is to be considered a part of this order as though wholly written out herein;

It is therefore ordered and adjudged that said defendants' motion to dismiss be and the same is hereby sustained and this case is hereby dismissed without prejudice to the plaintiffs as to all defendants, including

Acme Fast Freight, Inc., and all costs are assessed against the plaintiffs.

ORDERED AND ADJUDGED, this April 26th, 1973.

DAN M. RUSSELL, JR.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2383

MOHASCO INDUSTRIES, INC., *et al.*,
Plaintiffs-Appellants,
v.

ACME FAST FREIGHT, INC., *et al.*,
Defendants-Appellees.

April 1, 1974

* * * *

Richard W. Dortch, Jackson, Miss., Richard J. Hardy, Thomas A. Phemister, Washington, D. C., Michael P. Regan, Amsterdam, N. Y., for plaintiffs-appellants.

Bryce Rea, Jr., Patrick McEligot, Washington, D. C., Junior O'Mara, Jackson, Miss., for all defendants-appellees except Acme Fast Freight.

Samuel Weiner, New York City, for Acme Fast Freight, Inc.

Before COLEMAN, CLARK and GEE, Circuit Judges.

COLEMAN, Circuit Judge:

Plaintiffs-appellants, Mohasco Industries, Inc., and its subsidiaries, Chromcraft Corporation, Futorian Corporation, and Monarch Furniture Corporation, sued the defendants-appellees,[1] motor freight carriers, for restitution

[1] Acme Fast Freight, Inc., Arkansas Best Freight System, Inc., Beard Truck Line, Clark Truck Line, Crouch Brothers, Inc., East Express, Inc., Hennis Freight Lines, Inc., McLean Trucking, Merchants Truck Line, Pacific Intermountain Express, Pic-Walsh

of excess freight charges collected between January 16, 1968 and December 18, 1970. Upon motion, the complaint was dismissed for failure to state a claim upon which relief could be granted. We affirm.

The National Motor Freight Classification, of which the defendant motor carriers are members, published increased freight rates, effective January 1, 1968, for less-than-truckload shipments of many items of furniture. Protests were immediately registered by the furniture manufacturers, shippers, and dealers. Prior to the effective date, the Interstate Commerce Commission of its own initiative undertook an investigation of the reasonableness of the proposed new rates. The rates, however, were not suspended by the Commission pending the investigation, thus permitting them to take effect on January 16, 1968.

The Interstate Commerce Commission proceedings culminated in a finding by the hearing examiner that the increased rates had not been shown to be just and reasonable. In an order issued January 13, 1969, the examiner directed cancellation within thirty days. This order was stayed pending review by a Commission Review Board. The Board sustained the hearing examiner and ordered the rates cancelled by June 13, 1969. Again, this order was stayed while the motor carriers petitioned for reconsideration. Finally, on November 2, 1970, the Commission *en banc* held that the proposed changes were not shown to be just and reasonable, Classification Ratings on Furniture, 1970, 337 ICC 709. The Commission then ordered the increased rates cancelled by December 18, 1970. In compliance with that order, the carriers reinstated the rates which had been in effect immediately prior to January 16, 1968.

Freight Company, Robinson Truck Line, Shumpert Truck Line, Spector Freight System, Inc., Springmeier Shipping Company, Universal Carloading and Distributing Company.

On May 12, 1972, eighteen months after the old rates had been placed back in effect, plaintiffs-shippers filed suit in the District Court for the Southern District of Mississippi for restitution of the excess charges collected between January 16, 1968 and December 18, 1970. It was alleged that since the increased rates had not been shown to be just and reasonable, they were necessarily unjust and unreasonable from their inception, hence unlawful under the Interstate Commerce Act prohibiting unjust and unreasonable charges.[2] It was further alleged that the carriers had an equitable obligation to refund the amounts collected in excess of the once existing and subsequently reinstated rates. This amounted to $172,258.94.

The defendants-motor carriers moved to dismiss, asserting that the complaint failed to state a claim upon which relief could be granted. Looking to United States v. Associated Transport, Inc., D.D.C., 1972, 347 F.Supp. 650, as authority for its decision, the District Court granted the motion. This appeal followed.

On August 9, 1935, Congress enacted Part II of the Interstate Commerce Act, 49 U.S.C. § 301 et seq., commonly referred to as the Motor Carriers Act of 1935. Prior to this enactment, there had grown up a considerable body of common law supporting a shipper's right to *restitution* for unjust, unreasonable, and therefore excessive charges, Arizona Grocery Company v. Atchinson, T. & S. F. R. Company, 1931, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348; Arkadelphia Milling Company v. St. Louis S. W. R. Company, 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Baltimore & O. R. v. United States, 1928, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954; Atlantic

[2] Section 216(a) of the Act. 49 U.S.C. § 316(a), imposes upon motor carriers a duty to establish just and reasonable rates; Section 216(d), 49 U.S.C. § 316(d), prohibits any unjust and unreasonable charge and declares such charges to be unlawful.

Coastline R. R. Company v. Florida, 1935, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451.

Until 1959 many considered that this common law right of recovery had survived the enactment of Part II of the Interstate Commerce Act by reason of its "savings clause", 49 U.S.C., § 316(j);[3] Barrows Porcelain and Enamel Company v. Cushman Motor Delivery Company, 1939, 11 M.C.C. 365; Bell Potato Chip Company v. Aberdeen Truckline, 1944, 43 M.C.C. 237.

This view fell prey to a total reversal on May 18, 1959, when the Supreme Court decided T. I. M. E. Incorporated v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L. Ed.2d 952. As stated by the Supreme Court, the question in *T. I. M. E.* was:

> "Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation *the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment*?" [emphasis added.]

Although by a 5-4 vote of the Court, the answer was, "no". The common law remedy of restitution had not survived the enactment of the Motor Carriers Act of 1935, 49 U.S.C. § 301 et seq.; the "savings clause", Section 216(j) of the statute, 49 U.S.C., § 316(j), mandated no different result.

Hewitt-Robins, Incorporated v. Eastern Freight-Ways, Inc., 1962, 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142, was a case challenging a carrier's misrouting practices, not the "reasonableness" of rates. The Court allowed an action to proceed for common law recovery of sums paid because of misrouting, but it went to great pains to

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[3] 49 U.S.C. § 316(j):

"Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

assert and reassert that the decision in *T. I. M. E.* stood unaltered and unreversed.

From the foregoing we are convinced that from and after the decision in *T. I. M. E.*, unless Congress by statute should direct to the contrary, the shipper had no remedy in the courts on common law principles by which he could sue, after the fact, for the restitution of charges collected by motor carriers on tariffs duly filed with and left in effect by the Interstate Commerce Commission.

It necessarily follows that should Congress act in the premises, its enactments would provide the sole and exclusive remedy for excessive charges.

In 1965, Congress did act. It enacted the following statute:

> "§ 304a. Actions for recovery of charges; limitation of actions, definition; effective date; action by or against United States
>
> * * * *
>
> "(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> * * * *

"(5) The term 'reparations' as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 316(e) of this title, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

"(6) The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

"(7) The provisions of this section shall apply only to cases in which the cause of action may accrue after June 29, 1949."

P.L. 89-170, 79 Stat. 651, 49 U.S.C. § 304a.

It is at once apparent that Congress did not alter or expand the "savings clause", 49 U.S.C., § 316(j).

Thus, the shippers in the instant case had available no relief other than that afforded by the 1965 enactment.

The instant appeal, however, is not concerned with "reparations" under the Act of 1965.

"Plaintiffs chose to pursue restitution, rather than following the then still-available course of an action at law for 'reparations' under Section 204a which offered the possibility of partial recovery for shipments delivered within two years prior to filing such an action."

Appellant's original brief, page 6.

It is strongly urged that *T. I. M. E.* has been "greatly eroded" by the impact of subsequent court decisions. The trouble with this argument is that none of these were decisions of the Supreme Court of the United States. These cases, and others pending which have been brought

to the attention of the Court, indicate the existence of an organized move to have *T. I. M. E.* reversed. If that is to happen, it will have to be done by the Supreme Court, not by any of the inferior courts.

Moreover, we consider such cases as Middlewest Motor Freight Bureau v. United States, 8 Cir., 1970, 433 F.2d 212, to be inapposite.

In *Middlewest* the shippers sought recovery only for the period when a temporary restraining order was in effect, subsequent to an order of the Interstate Commerce Commission. Here, plaintiffs specifically seek recovery of excess payments from the very time the objectionable rates were first initiated.

The judgment of the District Court is

Affirmed.

APPENDIX C

TEXT OF RELEVANT SECTIONS OF THE MOTOR CARRIER ACT

ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

SEC. 204a. [*June 29, 1949, August 26, 1958, September 6, 1965.*] [*49 U.S.C. § 304a.*] (1) All actions at law by common carriers by motor vehicle subject to this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this part within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(3) If on or before expiration of the three-year period of limitation in paragraph (2) a common carrier by motor vehicle subject to this part begins action under paragraph (1) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(4) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(5) The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section (216 (e) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

(6) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(7) The provisions of this section shall apply only to cases in which the cause of action may accrue after the date of the enactment of this section.

(8) The provisions of this section 204a shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before any court or by or against carriers subject to this part: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U.S.C. 66), whichever is later.

* * * *

Sec. 216(d) All charges made for any service rendered or to be rendered by any common carrier by motor ve-

hicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * *

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unrea-

sonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the pupose of removing discrimination against interstate commerce or for any other purpose whatever.

* * * *

(f) Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation in interstate or foreign commerce of passengers or property by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express, and/or water are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge

was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

* * * *

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may

from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

* * * *

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 217. [*August 9, 1935, amended September 18, 1940.*] [*49 U.S.C. § 317.*] (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between

points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Note.—Comparable provisions, part I § 6(1) (schedules, filing, contents); § 6(6) (form prescribed, rejected schedules void); § 6(9) (rejection, defective schedules); part III, § 306(a) (tariffs, filing, contents); § 306(b) (rejected tariffs); part IV, § 405(a), (b).

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs; *Provided*, That the provisions of section 1(7) and 22[1] of part I

[1] By act of Sept. 18, 1940, § 22 (1) was changed to § 22, as above stated. By act of Aug. 31, 1957, 71 Stat. 564, the "(1)" was reinstated, and paragraph (2) was added to § 22, quotations or tenders of rates, fares, charges, for transportation for the Government.

Served November 17, 1970

30532

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. 34922

CLASSIFICATION RATINGS ON FURNITURE

Decided November 2, 1970

On reconsideration, changed less-than-truckload ratings on numerous furniture items found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

Donald E. Cross, Charles A. Moran, Jr., and *Bryce Rea, Jr.*, for respondents and intervener in support of respondents.

Arthur A. Arsham, G. R. Arvedson, John F. Bohman, John H. Caldwell, John M. Cleary, William Davidson, John F. Donelan, Robert B. Einhorn, Olay Ekrom, Jay D. Harris, Clyde E. Herring, Calhoun E. Jacobson, William C. Keenan, Hart J. Manlin, Edward A. McCabe, Marvin H. Morse, John W. Pettit, H. I. Power, Leonard M. Shinn, Fred H. Tolan, and *Charles A. Washer* for protestants.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

GRESHAM, *Commissioner*:

In the prior decision and order (not printed) Review Board No. 4 affirmed and adopted, with the omission of

a discussion of certain cost evidence, the report and recommended order of an examiner, dated December 17, 1968, which found that changed less-than-truckload (LTL) classification ratings on numerous items of furniture were not shown to be just and reasonable, and required their cancellation. By an order dated August 6, 1969, Division 2, Acting as an Appellate Division, denied the respondents' and intervener's joint petition for reconsideration and oral argument. By an order dated September 9, 1969, the Commission granted the respondents' petition for a determination that this proceeding involves an issue of general transportation importance. Thereafter, upon the joint petition of the respondents and the intervener for reconsideration and oral argument, the proceeding was reopened for reconsideration on the present record, and oral argument was denied. The facts will be restated to the extent deemed necessary. Portions of the examiner's report containing more detailed factual data are reproduced in slightly edited form in the appendix hereto. We find the examiner's statement thereof accurate and, as supplemented herein, adopt it as our own.

By schedules[1] filed to become effective on January 1, 1968, the respondents, about 5,500 motor carrier parties to the National Motor Freight Classification, proposed changes in the LTL ratings on 9,419 items of furniture. The changes apply on about one fourth of the approximately 200 descriptions of furniture in the classification. Upon protest by furniture manufacturers, shippers, and dealers located throughout the United States,[2] the pro-

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[1] The schedules under investigation are published in Supplement 21 to National Motor Freight classification tariff A-9, MF-ICC 9.

[2] The protestants are Alladin Prastics, Inc., American Retail Federation, Atlanta Freight Bureau, Association of School Business Officials, Authentic Furniture Products Co., Business Equipment Manufacturers Association, Carlson Furniture Industries, Douglas

posal was placed under investigation but the ratings were permitted to become effective; nevertheless they will be referred to herein as the proposed ratings. Although the protests were confined to the proposed increased ratings, all of the changed ratings were placed under investigation. The National Classification Committee intervened in support of the respondents and introduced most of the evidence in their support.

The proposed ratings are based exclusively on the factor of shipping density, as set forth below:

TABLE 1

Density (pounds per cubic foot)	*Less-than-truckload ratings (class)*
Less than 2.00	350
2.00 to 2.99	300
3.00 to 3.99	250
4.00 to 4.99	200
5.00 to 5.99	175
6.00 to 6.99	150
7.00 to 7.99	125
8.00 to 8.99	110
9.00 to 10.49	100
10.50 to 11.99	92.5
12.00 to 13.49	85
13.50 to 14.99	77.5
15.00 or more	70

Overall, the proposed ratings result in 72 increases and 5 reductions in the prior ratings. In addition, the

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Furniture of California, Inc., Furniture Manufacturers Association of California, General Services Administration, Metalcraft Products Co., National Association of Bedding Manufacturers, National Association of Furniture Manufacturers, National Furniture Traffic Conference, Inc., National Kitchen Cabinet Association, National Office Products Association, National School Supply & Equipment Association, New Jersey Furniture Association, Northwest Furniture Manufacturers Association, Outdoor and Casual Furniture Traffic League, Southern Furniture Manufacturers Association, Southern Retail Furniture Association, Steel Office Furniture Traffic Association, Toy Manufacturers of America, Inc., Virco Manufacturing Corporation, and Virtue Bros. Manufacturing Company.

proposed schedules include seven new commodity descriptions which result in four increased ratings and three reduced ratings. The proposed schedules eliminate certain differences in ratings based on the type of packaging, thereby producing nine additional rating reductions. Typical examples of the proposed increases in classification ratings are set forth below:

TABLE 2

Classification description	Prior rating	Proposed rating	Increase
Wooden and case goods	*Class*	*Class*	*Percent*
Beds or bed ends, wooden or padded, SU or KD.	100	125	25
Bookcases, other than sectional, not nested	125	175	40
Buffets, china closets, sideboards, hutches, credenzas, et cetera, SU.	125	175	40
Dressers, chest of drawers, bureaus, highboys, lowboys, et cetera, SU.	100	150	50
Nightstands, chifforobes, commodes, et cetera, SU.	100	150	50
Cabinets, music record, phonographs, et cetera, SU.	125	150	20
Cabinets, storage or wardrobe and kitchen cabinets, SU.	125	175	40
Chairs, wooden, SU:			
School or cafeteria with arms	200	300	50
School or cafeteria, arms off	125	175	40
Finished, not upholstered, (8F)	200	300	50
Cribs, cradles, or playpens, wooden, KD	85	100	18
Desks, wooden, SU, with drawers	125	175	40
Desks, wooden, SU, without drawers	150	200	33.3
Racks, book or magazine, SU, wooden	100	300	200
Tables, dressing or toilet, wooden, SU	100	175	75
Tables, coffee, et cetera, SU, wooden	150	200	33.3
Tables, wooden, KD (legs off)	85	100	18
Upholstered goods			
Davenports, sofas, lounges, et cetera, SU, upholstered.	175	250	43

Classification description	Prior rating	Proposed rating	Increase
Upholstered goods	*Class*	*Class*	*Percent*
Dual purpose sofa bed and sleeping mechanism.	125	175	40
Chairs, overstuffed, SU, in cartons	175	300	71
Chairs, upholstered or rocker types, SU (7F)	175	300	71
Chairs, revolving, SU, upholstered	150	250	66.7
Ottomans or foot stools, SU, upholstered	125	200	60

The ratings on furniture in the classification first published by the respondents in 1936 remained essentially unchanged until 1958 when alternating truckload ratings were established. In 1962, about 40 LTL ratings on furniture were increased, and the use of packages, known in the rail classification as F packages, was authorized. Despite those increased ratings, individual respondents informed the National Classification Board, an adjunct of the National Classification Committee, hereinafter called the Board, that they were not satisfied with the rating levels on most articles of furniture. During 1965, one of the respondent motor carriers filed a proposal with the Board under which all LTL ratings on furniture would be canceled and replaced by ratings based on the packaged density of furniture articles as tendered for shipment. The proposed ratings ranged from class 400 on furniture with a density of less than 2 pounds to class 100 on furniture with a density of 12 pounds or more. The Board held public hearings throughout the United States on the foregoing proposal. Much shipper opposition to the density basis for the ratings was encountered, and the Board therefore determined to obtain more current information on the transportation of furniture. The two traffic studies described below were the result.

Nationally there are more than 5,000 manufacturers of household furniture, exclusive of producers of office, church, and school furniture. Of these, the Board sent questionnaires to 239 producers, of which 71 replied. The Board also obtained density information from the National Furniture Traffic Conference, Inc. (the Conference), which obtained the data from 45 other furniture manufacturers. Thus, a total of 116 shippers provided the density data. With few exceptions, those 116 shippers were located east of the Mississippi River, including several in New England. In his recommended report, the hearing examiner criticized the study because the shippers were not geographically representative and the selection did not reflect random sampling, volume of production, or type of furniture produced.

The second traffic study is based on information gathered shortly after the proposed ratings became effective on January 16, 1968. The purpose was to yield weighted average densities which would establish retroactively that the arithmetic average densities derived from the shippers' study were fairly representative of the densities of shipments actually moving in motor carriage. The second study is based on certain measurements and weighing conducted by five of the Board members at 59 carriers' terminals at 24 points in nine States. The hearing examiner criticized the carriers' study because the 59 terminals were not chosen by random sampling, and because the Board members who inspected the shipments used no systematic basis for selecting the shipments they inspected. Sometimes they weighed and measured only steel furniture shipments, and at others, due to lack of time, they did not inspect all the furniture shipments which went through a terminal in 1 day. The examiner also criticized the study because the inspections were not confined to interstate shipments and apparently were not confined to LTL shipments. In view of these deficiencies,

the examiner concluded that the weighted average densities derived from the carrier's study could not, in fact, be weighted, as represented by the Board. The density "formula" set forth in table 1 is not a part of the proposed schedules, although it is the basis for the ratings. With respect thereto, the examiner concluded that "* * * a necessary finding that the ratings under investigation are shown to be just and reasonable is unwarranted due to the failure of proof as to the lawfulness of the density formula; * * *."

DISCUSSION AND CONCLUSIONS

We agree with the examiner's analysis and conclusion regarding the shippers' study.

Most shippers refuse to release density data. However, the carriers should be able to obtain all the essential information from observation of their own operations. The carriers' traffic study based on data from their terminals would have been sufficient had that study been conducted in a manner warranting a conclusion that the results were reliable. We agree with the examiner that the study presented does not justify such a conclusion.

In a report in a rate structure investigation, *Furniture*, 177 I.C.C. 5, 109, the Commission prescribed the density formula for railroad less-than-carload ratings of furniture which appears below:

TABLE 3

Density (pounds per cubic foot)	*Less-than-carload rating (class)*
Less than 3	300
3.01 to 3.75	250
3.76 to 4.75	200
4.76 to 5.75	175
5.76 to 7.25	150
7.26 to 9.50	125
9.51 to 12.50	100
12.51 or more	85

In subsequent decisions involving motor carriage, cognizance has been taken of the difference between rail and motor transportation. Of particular relevance here is the following statement from *Incandescent Electric Lamps or Bulbs*, 44 M.C.C. 501, 512:

> In the light of the paramount importance of space in the determination of reasonable motor common carrier classification ratings, we are of opinion such ratings should be so arranged that, so far as practicable, as the densities of the commodities decrease, the revenues thereon should remain approximately equal; that the application of one rating to a group of commodities having too great a range in weight densities militates against this principle and that, therefore, there is need for much greater refinement in motor-carrier ratings than has heretofore been the rule in fixing classification ratings on freight moving by rail. What was done in *Furniture*, *supra*, we believe should guide us in these proceedings. Applying the same rating to commodities transported by motor carrier, ranging in density from less than 5 to 8.5 pounds a cubic foot, as has been done in the case of commodities moving by rail, clearly puts an undue burden on the heavier commodities and favors the lighter commodities by exacting lower charges thereon in relation to the space occupied.

The density formula in this proceeding attempts the refinement referred to in the above quotation. For example, the prescribed rail formula rated at class 300 all shipments with a density of 3 pounds per cubic foot or less, while the formula involved herein divides such shipments into two brackets with ratings of classes 300 and 350. The deficiency here is not with the formula per se, but in the lack of adequate underlying evidence to show that it was devised, not arbitrarily, but on a just and reasonable basis.

Without intending in any way to limit the evidence which carriers present, or to prescribe a sole method for producing evidence, in the remaining discussion we suggest certain guidelines for a traffic study of density.

Carriers' terminals and shipments[3] (100 percent selection for certain terminals and shipments is acceptable) should be selected by probability sampling which is sufficiently accurate to support a formula used as a basis for proposed classification ratings. In this connection, see *Motor Carrier Probability Sampling Studies*, 329 I.C.C. 683, which prescribed a probability study for the collection of various cost data and gave guidelines for the collection of the data. The carriers in the frame for the sample study should include all those interstate motor carriers which are parties to the National Motor Freight Classification, A-9, MF-ICC 9. Assuming that the ratings in question are to apply only on LTL shipments, the study should be so confined. The proper time frame should be a year in which random sampling should be used in the selection of days from the year on which to inspect the shipments at the selected terminals.

While not essential, stratification of the terminals, using a measure of size such as the average number of furniture shipments at a terminal, would be useful. Then the selection of terminals should be made at higher rates for the strata with the larger terminals. Also, the use of stratification by kind of furniture on which the density evidence is to be computed may give improved results. Sampling errors should be presented along with the final results for each of the important estimates. The sampling errors may be computed by standard methods or through the proper use of replication.[4] Because of the

[3] In lieu of shipments, the sample unit may be a freight bill, a truckload, or all the shipments on 1 day.

[4] Cochran, W. G., *Sampling Techniques*, 2d edition, John Wiley & Sons, Inc., 1963.

[Footnote continued on page 33a]

complexity of the sample study, a qualified sampling expert, working with specialists in the furniture classification field and the carriers' management, to properly develop the sample plan and execute the sample, would be helpful. For the presentation of the results of the study, reference is made to "Guidelines for Presenting Sample Studies," issued January 2, 1968, by the Commission's Bureau of Economics.

We suggest the following method of computing the density of several sample values, which involves the division of total weight by total volume. This method presupposes the use of stratified or stratified cluster sampling to reflect the selection of certain terminals of several carriers, and the selection of certain days of the year on which the sampling is to be performed. To illustrate the sampling method, we have chosen the commodity "beds and bed ends," as shown in the classification. If, at a certain terminal handling a large daily volume of traffic, it is decided to sample one out of five LTL shipments passing through that terminal on a certain day of the year, the first shipment is selected at random from among the first five shipments, and every fifth shipment thereafter. All sampled shipments not containing furniture are disregarded. The first sampled shipment of furniture, which contains beds or bed ends weighing 500 pounds and having a volume of 40 cubic feet, is recorded in table 4 below as a sample from that terminal. For convenience, we have listed in table 4 only one sample from each of six fictitious terminals.

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[4] [Continued]

Deming, W. E., *Sample Design in Business Research*, John Wiley & Sons, Inc., 1960.

Hansen, M. H., Hurwitz, W. N., and Madow, W. G., *Sample Survey Methods and Theory*, Volumes 1 and 2, John Wiley & Sons, Inc., 1953.

Kish, L., *Survey Sampling*, John Wiley & Sons, Inc., 1965.

TABLE 4

Identification number	Shipment sample values		Sampling rate	Sample weighting factor [1]	Weighted sample values	
	Pounds	*Cubic feet*			*Pounds*	*Cubic feet*
1	500	40	1/5	5	2,500	200
2	300	80	1/50	50	15,000	4,000
3	1,000	190	1/20	20	20,000	3,800
4	400	90	1/5	5	2,000	450
5	700	200	1/20	20	14,000	4,000
6	150	50	1/5	5	750	250
					54,250	12,700

[1] Sample weighting factor means the reciprocal of the overall sampling rate.

The weighting of the sample shipments shown in table 4 should be done as follows: For shipment 1, the sample weighting factor of 5 is multiplied by the weight of that sample, 500 pounds, and by the volume, 40 cubic feet, to obtain the weighted poundage of 2,500 pounds and the weighted volume of 200 cubic feet. The total weighted poundage of the six items, 54,250 pounds, divided by the total weighted volume, 12,700 cubic feet, equals a weighted density of 4.27 pounds. In a real traffic study, of course, there would be many samples at each selected terminal, and thus the weighted average density for beds and bed ends would be based upon a much greater sampling than that shown in table 4.

On reconsideration, we find that the proposed change in the National Motor Carrier Classification ratings on numerous articles of furniture, in LTL, are not shown to be just and reasonable.

COMMISSIONER TUGGLE, whom COMMISSIONER BREWER joins, concurring:

I concur in the conclusion of the majority insofar as it finds that the proposed changes in the National Motor

Carrier Classification ratings on numerous articles of furniture, in LTL, are not shown to be just and reasonable. However, I do not agree that this conclusion is warranted simply because of certain sampling deficiencies spelled out in the report. As I see it, the protestants have done much more than simply show that the respondents' density studies are inadequate because of the failure to use probability sampling therein. Rather, it seems to me, the protestants have actually rebutted the density data developed by the respondents' own methods and shown that in various instances the respondents' density data was affirmatively in error, and thus inadequate for justifying the rating changes based thereon. For example, in exhibits 160 to 162, the protestants offered their own rebuttal survey respecting wood and steel revolving chairs, knocked down, to show that the weighted average density of that article is over 7 pounds per cubic foot rather than less than 4 pounds per cubic foot as computed by the respondents. At that higher density, a rating of 125 would apply under the formula proposed here rather than the 250 rating which is proposed.

Accordingly, I would find that on the record before the Commission the respondents have failed to justify the changes in ratings proposed here as being just and reasonable.

COMMISSIONER DEASON dissents.

It is ordered, That the respondent motor carriers be, and they are hereby, notified to cancel the tariff schedules designated in the order of Division 2, Acting as an Appellate Division, entered in this proceeding on January 15, 1968, on or before December 18, 1970, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner pre-

scribed by the Commission under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX

Density.—Evidence submitted by the Board concerning the densities of the furniture articles under investigation is derived from two sources. The principal source, and the one relied on to ascertain the ratings under consideration, is data furnished to the Board directly or indirectly by furniture manufacturer's as briefly described hereinbefore. The other source of evidence is from a study made by members of the Board subsequent to the effectiveness of the ratings herein; such study will be described later.

The collection of data from furniture producers was admittedly not statistically based. There are more than 5,000 producers of household furniture, and an unspecified number of manufacturers of furniture for churches, theatres, stores, schools, and various business and professional offices. The Board was unaware of the number of furniture producers in total, or as to those who manufacture any particular category of furniture, and made no effort to determine such information before sending a questionnaire to 239 companies. The 116 producers who replied directly or indirectly in supplying the data used by the Board, not having been chosen by random sampling, are obviously not representative of the whole furniture manufacturing industry as to locations, volumes of production, or other relevant transportation matters. Although the basic reason for seeking density

data was a reassessment of LTL ratings for transportation by motor common carriers, the relatively few non-representative furniture producers who were surveyed were not asked concerning the volume of production of their furniture lines, nor the volume shipped in the service of respondents rather than by rail, trailer-on-flatcar, contract truckers, private carriage, the Railway Express Agency, or freight forwarders. Not having sought information concerning the volume of furniture moved by respondents, there was, of course, no query as to the amounts moved as truckloads rather than in LTL shipments. The densities so collected, unweighted and derived from sources not shown or likely to be representative, provide a weak and statistically unsound foundation for the use to which they were put by the Board, acting for respondents.

In applying a density formula such as that used by the Board, with increments of only a pound or 1.5 pounds separating the ratings, it is extremely important to use weighted average densities in order to prevent distortions which can be produced by the use of arithmetical averages. For example, based on data supplied by three producers the Board computed an arithmetical average density of 6.47 pounds for 29 models of steel pedestal desks; under the density formula a proposed LTL rating of class 150 was published on such desks. In comparison, the Steel Office Furniture Traffic Association gathered density data from 11 producers on a weighted average basis. Such density for steel pedestal desks was 7.21 pounds which would be rated class 125 for LTL under the density formula used by the Board. The failure of the Board to learn or attempt to discover the weighted average densities of furniture items is a substantial infirmity in its classification analysis.

It is apparent also that only the few producers who supplied density information to the Board, and those un-

known producers who manufacture the same types of furniture, are affected by this reclassification. Producers of other types of furniture who were not queried as to density, or who did not answer such query, escaped any change in the ratings on their products. The record does not afford a basis for judging whether this discrimination is undue and hence unlawful. Nevertheless it should be noted that the Board has not accomplished its original purpose, namely, a reassessment of the LTL ratings on furniture hauled by respondents. Only a partial reassessment, at best, has been completed, and the burden of increased ratings flowing from that uneven appraisal is not borne by numerous furniture manufacturers.

Of the 116 furniture producers who supplied information as to the densities of their products, 10 are located among the New England States. The proposed ratings do not apply on shipments moved within such States. No effort was made to secure information restricted to traffic which is transported beyond the border of the New England States on which the proposed ratings would apply. To the extent that the producers located in the New England States consign LTL in motor common carrier service within that area, the densities they supplied to the Board may not be representative of the traffic being moved by respondents under the proposed LTL ratings. The use of such densities could cause a bias in the arithmetical average densities computed by the Board and applied to its density formula.

The second source of density information shown herein is the actual measurement and weighing of furniture shipments at terminals of some of the respondents. These inspections were conducted by five members of the Board, three of whom testified as to the inspections they had conducted. These latter inspections took place, after the proposed ratings became effective, at 59 terminals of the respondents located at 24 points in nine States. The two

inspectors who did not testify herein made inspections in the same period at nine points in five States. There are 25 terminals at such points but it is not shown at how many terminals shipments were inspected. No information was obtained as to 12 of the furniture items under consideration, and the arithmetical average density of 17 other items fell within the same scale integer as that computed originally by the Board. As to the remaining items the arithmetical average density was lower in 24 instances in sufficient degree to have required a higher rating under the scale, and higher enough on six items to have required a lower rating.

The principal purpose of gathering density information after the proposed ratings were effective was to determine weighted average densities to be used in support of the classification charges made on the basis of arithmetical densities. Two methods were used by the inspectors to select furniture shipments to be measured and weighed at the terminals. Whenever possible, the inspectors looked at bills of lading before trucks were unloaded and selected those bills covering furniture shipments. The bills were given to the dispatcher who arranged for such shipments to be set aside on the docks to be weighed and measured by the inspectors. The other method of selection was to examine shipments lying on the dock, or moving by on draglines, to determine from the shape, size, or markings if it was a furniture shipment.

One of the protestants, the Outdoor and Casual Furniture Traffic League, contends that reference by the inspectors to the bills of lading, and taking information therefrom for use in this proceeding, is a violation of section 222(e) of the act because the consent of the shipper or consignee to disclose information on the bills was not obtained, and such information may be used to the detriment or prejudice of the shipper or consignee. No

claim is made that any shipper or consignee has suffered any detriment or injury, and it does not appear likely that any detriment or injury is now possible. The names of the manufacturers are not connected in the evidence to any shipment to a particular consignee or destination. No retailed facts of any possible value to a competitor were introduced of record by respondents, and it does not appear that section 222(e) has been violated.

The cities and terminals at which the inspectors determined densities were not chosen by a random sample. At some of the points the inspectors limited their inspections to shipments of steel furniture. At other points the inspectors did not have time to weigh and measure all of the furniture shipments passing through the terminals they visited on that day, either because the volume of traffic was too great or because they spent only a portion of the day at a terminal. The inspections were not limited to interstate traffic but intrastate shipments were included also. The shipments inspected may have been limited to LTL but this fact is not affirmatively established.

Weighted average densities were computed by the Board based on the data collected by the five inspectors. The specification of such densities as weighted average does not make them so in actuality. The aforesaid numerous deficiencies in the collection of the data relied on militates against the densities being a true reflection of the actual weighted average densities of furniture being moved by respondents in interstate commerce in LTL shipments. Nor do the arithmetical average densities generated from the inspections lend support or validate such densities as computed from data supplied by the 116 furniture producers. In fact the data gathered by the inspectors differ from, more often than it agrees with, the density information relied on as a basis for the proposed ratings. The inspections appear to have

been hurriedly conceived and were conducted in a hit-and-miss fashion. They did not result in the scientific accumulation of reliable information relative to the arithmetical or weighted average densities of the furniture articles under investigation.

On this record it cannot be found that the respondents have determined, or even tried to scientifically determine, the reliably accurate densities of the furniture items under investigation. In other words the respondents have not been successful in proving that the proposed ratings were justified because of the densities of the furniture articles they have classified and rated.

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IN THE

Supreme Court of the United States

No. 73-1958

MOHASCO INDUSTRIES, INC., *et al.*,
Petitioners,

v.

ACME FAST FREIGHT, INC., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

"Can a shipper of goods by a certificated motor carrier challenge [in a suit for restitution] the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 465 (1959).

STATEMENT OF THE CASE

The National Motor Freight Classification is the tariff filed with the Interstate Commerce Commission which contains the classifications of property for rate making purposes governing transportation by motor common carriers

and freight forwarders.[1] On or about December 1, 1967 there were filed with the Commission numerous new classifications of furniture. Many articles were put in higher classes and some were put in lower classes. Over protest the Commission permitted the new classifications to become effective, but instituted an investigation of their reasonableness under Section 216(g) of the Interstate Commerce Act (49 U.S.C. 316(g), App. to Pet., p. 21a). On November 17, 1970 it issued a decision finding that the new classifications were "not shown to be just and reasonable" and ordering them cancelled on or before December 18, 1970. The carriers complied with the order.

On May 12, 1972 Mohasco Industries, Inc. and three subsidiaries (hereinafter Mohasco) sued several motor carriers and freight forwarders (hereinafter Carriers) in the United States District Court for the Southern District of Mississippi to recover the difference between freight charges calculated at the new classifications and freight charges calculated at the old classifications on shipments of furniture transported for them between January 1, 1968 and December 17, 1970.[2] The District Court dismissed the complaint for failure to state a claim upon which relief could be granted and the Court of Appeals affirmed its judgment. *Mohasco Industries, Inc., et al.* v. *Acme Fast Freight, Inc., et al.* 491 F. 2d 1082 (5th Cir. 1974).

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[1] All commodities moving in commerce are assigned to one or more of fifteen classes on the basis of their transportation characteristics, e.g., weight per cubic foot as packed for a shipment, value, susceptibility to loss or damage. The higher the class the higher the rate.

[2] Mohasco's complaint erroneously assumed that the changed classifications took effect on January 1, 1968. In fact they took effect on January 16, 1968.

REASONS WHY PETITION SHOULD BE DENIED

Rule 19(1) of the Rules of this Court indicates "the character of reasons" it will consider in determining whether there are "special and important" reasons to review decisions of courts of appeals on writ of certiorari:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

We examine the decision here in the light of these considerations. Plainly, the Court of Appeals did not decide a "state or territorial question" and did not depart, or sanction the departure by a lower court, "from the accepted and usual course of judicial proceedings." Nor did it decide a federal question which has not been settled by this Court or in a way in conflict with applicable decisions of this Court. Quite the contrary. In *T.I.M.E.*, *supra*, this Court held that the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, created no cause of action for the recovery from motor carriers of charges based on unreasonable rates, and that no such cause of action which may have preexisted that Act survived it. The Court of Appeals applied that holding here, *viz*:

> "[F]rom and after the decision in *T.I.M.E.*, unless Congress by statute should direct to the contrary,

> the shipper had no remedy in the courts on common law principles by which he could sue, after the fact, for the restitution of charges collected by motor carriers on tariffs duly filed with and left in effect by the Interstate Commerce Commission." (App. to Pet., p. 149; 491 F. 2d at 1084).

We come then to the question whether, as Mohasco contends, the decision here is in conflict with the decision in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (8th Cir. 1970), cert. den. 402 U.S. 999 (1971). There, as here, increases in rates took effect while the Commission was in the course of formally investigating their lawfulness under Section 216(g). There, as here the Commission found the increases "not shown to be just and reasonable" and ordered them cancelled on or before a date certain. The carriers there then did what the carriers here did not do. They brought suit to set aside the Commission's order, and sought and were granted a temporary restraining order against its enforcement. By means of the temporary restraining order the carriers there avoided compliance with the Commission's order and kept the increases in effect after the date on which they had been ordered cancelled. In contrast, the carriers here complied with the Commission's order by cancelling the increases on the date the order fixed.

The temporary restraining order in *Middlewest* was dissolved as having been improvidently granted when the District Court denied a preliminary injunction, and the suit to set aside the Commission's order was thereafter dismissed. Shippers then sought restitution. The Court of Appeals held that the Commission's order directing the cancellation of the increases in rates rendered them unlawful as of the effective date of the order and granted restitution of the difference between the higher freight charges collected during the period of the temporary

restraining order and the lower freight charges that would have been collected had the increases been cancelled on the date the Commission's order required.

The Court in *Middlewest* was at pains to distinguish the case before it, in which a remedy in restitution lay, and cases such as that before the Court here, in which only a remedy in reparations lies. It explained that a suit for reparations under Section 204a of the Act (49 U.S.C. 304a, App. to Pet., p. 17a) is the remedy where, as in the case here, the claim is that applicable rates lawfully collected under the outstanding regulations and orders of the Commission exceeded just and reasonable rates. Hence, said the Court, any proceeding involving reparations, whether administrative or judicial, requires a finding by the Commission "as to what a specific just and reasonable rate is." 433 F. 2d at 232. In contrast, restitution was the remedy where, as in the case there, the claim was for monies collected under rates that the Commission had ordered cancelled and that would not have been collected but for the improvident judicial restraint of the Commission's order. In the latter case the Court was not adjudicating anything involving the primary jurisdiction of the Commission, but rather merely giving effect to the Commission's order of cancellation which had been improvidently restrained. As the Court held:

> "*The question of restitution arises because the carriers invoked the aid of the federal courts performing their equitable functions.* Traditionally, the restitution remedy has been available to persons who are injured by the restraint of an administrative agency order where that restraint was not warranted." 433 F. 2d at 241 (Emphasis supplied).

Mohasco also points to *Admiral Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D. Colo. 1971), aff'd *per curiam*, 404 U.S. 802 (1971). In

that case motor carriers filed increases in rates. The Commission refused to suspend the increases but instituted a formal investigation of them and set a date for hearing. The carriers requested that the hearing be postponed for ninety days. The Commission granted the request upon the condition that the carriers make refund to shippers on shipments moving after the date it had set for hearing to the extent that all or any part of the increases were not approved. Upon completion of the investigation the Commission found the increases not shown to be just and reasonable and ordered the carriers to make refund in accord with the condition.

The District Court of three judges dismissed the carriers' suit to set aside the Commission's order requiring refunds. The first ground of the decision was that the Commission, having discretion to issue appropriate procedural orders, e.g., to grant or deny a postponement of the hearing, had authority to condition such orders as it did.[3] The second ground was that the carriers, having withdrawn an initial objection to the order imposing the condition and having accepted the benefit of the postponement of the hearing were equitably estopped from the relief they sought. To quote the Court:

> "While we do not commend the Commission's procedure as one which should be or could be practiced, we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely, annulment of the

[3] Section 15(7), 49 U.S.C. Section 15(7), which gives the Commission authority to investigate increases in rail rates, also gives it authority to enter orders requiring railroads to make refund of such portion of the increased rates as it finds not justified. Section 216(g) under which the Commission proceeded in *Admiral Merchants* and in the case here, gives it no such authority over motor carriers and the Congress has ignored its request that Section 216(g) be amended to give it the authority to "impose refund provisions in proceedings" on increases in the rates of motor carriers. 86th Annual Report to Congress (1972), p. 91.

Commission's order and approval of the carriers' conduct." 321 F. Supp. at 360.

As the Court in *Admiral Merchants* said, that case and *Middlewest* are "somewhat analogous." The analogy the Court found lay in the fact that in both cases the courts did no more than give effect to the Commission's orders. 321 F. Supp. at 360. In contrast, in this case there was no order of the Commission to which the Court could give effect. The only order of the Commission directed the cancellation of tariffs by a date certain and the carriers complied with it.

Mohasco argues that the Congress in effect overruled *T.I.M.E.* when it amended Section 204a of the Act in 1965 to create a cause of action for reparations. The theory is that the creation of a statutory remedy in reparations was a legislative declaration that the "savings clause" in Section 216(j) of the Act (49 U.S.C. 316(j), App. to Pet., p. 22a), which preserves "not inconsistent" common law remedies, is to "be regarded as preserving a *different* and (in present circumstances) a more fitting retrospective remedy than Congress has now directly incorporated into the Act." (Pet., p. 8; Emphasis in the original).

T.I.M.E. squarely held that no common law right to recover unreasonably high freight charges from motor common carriers survived the passage of the Motor Carrier Act. In so holding this Court relied in part on *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which held that no such right against railroads survived the passage of Part I of the Act "despite the existence [therein] of a savings clause much broader in scope than that" in Part II. 359 U.S. at 473. As *Abilene* further held, contrary to the contention of Mohasco, the creation of a statutory remedy argues against the existence of a common law remedy.

All Section 204a does is create a statutory remedy. As the Court of Appeals held, a mere reading of it makes "at once apparent that Congress did not alter or expand the 'savings clause'." Neither did it change any other provisions of the Act. In other words, the Congress did not legislatively interpret the Act differently than this Court had so as to restore a common law remedy. Instead, it did what it had not previously done, namely, create a cause of action for reparations against motor carriers.[4]

Mohasco notes that the Commission is "reported" to be of the view that the remedy in restitution survived the passage of the Motor Carrier Act, and that allowance of the remedy would further the purpose of the Act. This is of course the view this Court rejected in *T.I.M.E.* This Court there held that no common law right to reasonable rates survived because only the Commission can determine what rates are reasonable and the Commission's only authority respecting the rates of motor carriers is prospective.[5]

After the decision in *T.I.M.E.* the Commission urged the Congress to give it jurisdiction to entertain complaints and award damages aaginst motor carriers for the collection of unreasonably high rates in the past. The Congress refused to do so. Instead, it gave the Commis-

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[4] Three of the Respondents here are freight forwarders brought under regulation by the Commission in 1942 with the enactment of Part IV of the Interstate Commerce Act. Part IV contans no "savings clause" at all. Hence, there can be no doubt that the only remedy against them is the cause of action in reparations created in Section 406a of the Act, 49 U.S.C. 1006a, which is the same as, and was enacted simultaneously with, Section 204a.

[5] A finding that increases in rates are "not shown to be just and reasonable", the finding here, is not a finding that they are unreasonable. *Middlewest*, 433 F.2d at 222; *U.S.* v. *Davidson Transfer and Storage Co.*, 259 F.2d 802, 806 (D.C. Cir. 1958), revd. on other grounds 359 U.S. 464 (1959); *Feinstein* v. *N. Y. Central R.*, 159 F. Supp. 460 (S.D. N.Y. 1958).

sion the limited retrospective authority contained in Section 204a, i.e., ancillary authority to determine reasonableness in the past in aid of the jurisdiction to entertain suits for reparations that it gave the courts. See *Informal Procedure for Determining Motor Carrier and Freight Forwarders Reparations*, 335 I.C.C. 403 (1969). In that case the Commission, upon review of the legislative history of Section 204a, concluded that it could determine the reasonableness of rates in the past only upon formal complaint under Section 216(e) of the Act and then only after suit for reparations had been instituted.

Mohasco does not deny that the statutory remedy provided in Section 204a was available to it. (Pet. pp. 3-4, 11 n.7). It excuses its failure to invoke that remedy on the ground that the Commission had entered an "order" in which it stated that the "true basis of the shippers' right to a refund is their common law remedy for restitution." (Pet., p. 4.) That "order" had nothing to do with this case. It was made to support a motion in *Admiral Merchants*, *supra*, to dismiss the suit to set aside its refund order for want of jurisdiction over the subject matter.[6] The theory was, as stated in the memorandum supporting the motion, that the refund order was not judicially reviewable because it was "not a requirement imposed by the Commission under the Interstate Commerce Act," but merely a declaration of the Commission's view of the carriers' equitable obligation and common law duty. The District Court disagreed, holding that it had jurisdiction to review the order and that the case was one to be decided by a three-judge court. 321 F. Supp. at 357. The Commission and the

[6] The "order" of the Commission in which the statement is made commences as follows: "Voted to authorize the General Counsel to state to the District Court in a motion to dismiss the action . . . that the true basis. . . ." Of ten Commissioners sitting three dissented and three did not vote.

United States moved to dismiss the carriers' appeal to this Court for want of jurisdiction. This Court entertained the appeal and affirmed the judgment. 404 U.S. 802. The United States District Courts entertain suits by shippers to collect the refunds under their jurisdiction to enforce orders of the Commission. *Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.*, 486 F. 2d 717 (7th Cir. 1973), *cert. denied*, —— U.S. ——, 38 L. Ed. 2d 739 (1973).

CONCLUSION

In sum, Mohasco asks the Court to overrule *T.I.M.E.*, claiming that it "has been eroded by subsequent decisions of other circuits." (Pet., p. 6). We have demonstrated that the two decisions to which Mohasco points do not support its claim. Nor is there any reason for overruling *T.I.M.E.* Its interpretation of Part II of the Interstate Commerce Act was carefully considered and accepted by the Congress. In 1965, six years after the decision, the Congress provided a specific procedure for the recovery of damages against motor carriers and freight forwarders for the collection of unreasonably high rates. In so doing the Congress specifically rejected legislation that would have provided the simpler alternative procedure provided for the recovery of such damages against railroads. Since then the Congress has ignored the Commission's requests for authority to compel refund in precisely the situation in which Mohasco asks the Court to do so. In these circumstances we submit that there is no reason for this Court to re-examine *T.I.M.E.*, and urge that the petition for a writ of certiorari be denied.

Respectfully,

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Dated: August 9, 1974

CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., counsel for Respondents herein, hereby certify that, on the 9th day of August, 1974, I served the foregoing Brief on the parties hereto by mailing copies, postage prepaid, to the following:

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BRYCE REA, JR.

RESTRAINT
SUPREME COURT, U. S.
OCT 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1958

MOHASCO INDUSTRIES, INC., ET AL.,
Petitioners,

v.

ACME FAST FREIGHT, INC., ET AL.,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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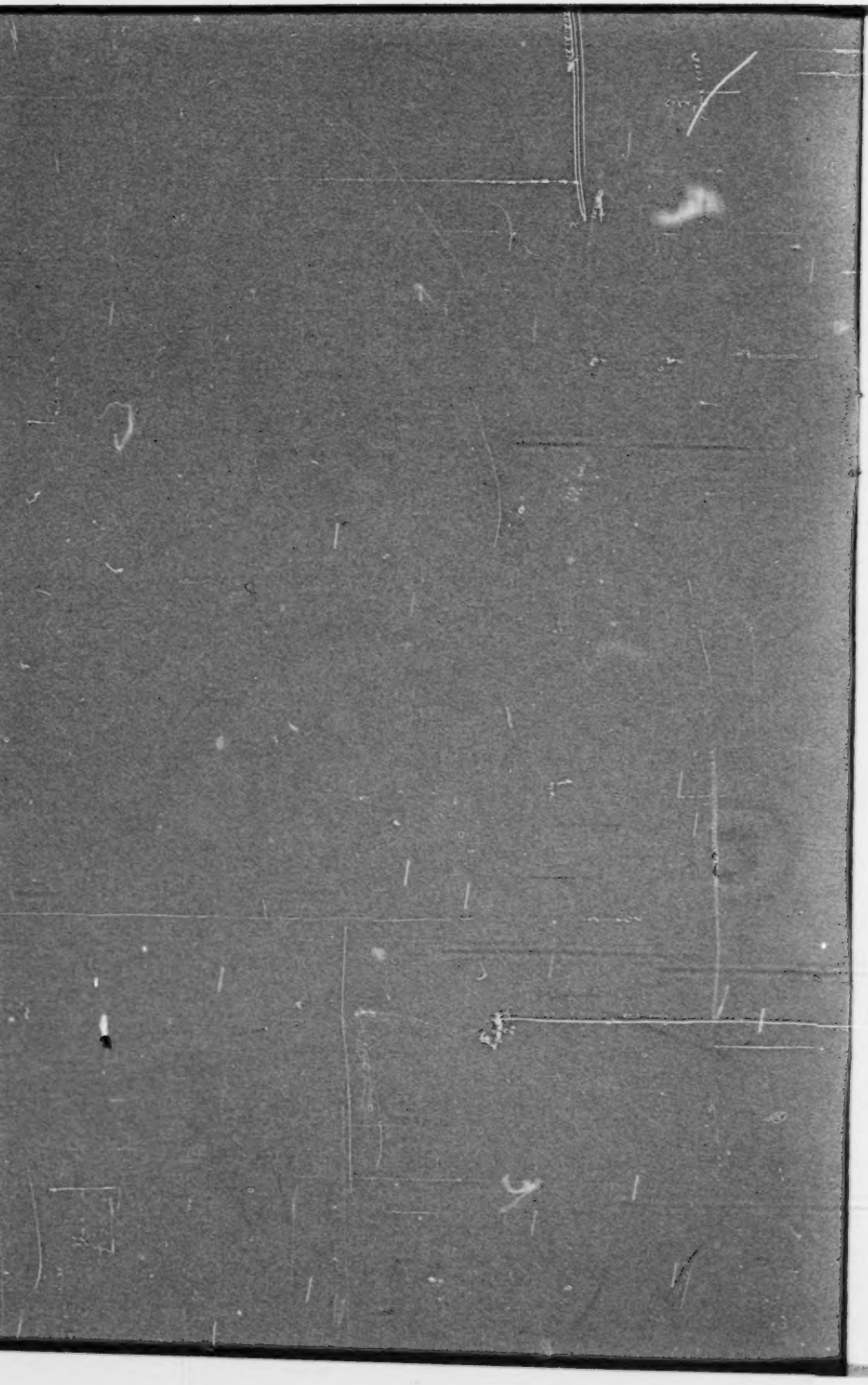

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IN THE

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Come now Respondents and, pursuant to Rule 24 of this Court, file this Supplemental Brief to bring to the attention of the Court the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Associated Transport, et al.* That decision, rendered October 1, 1974, is Appendix A hereto.

As is readily seen, the *Associated* Case is on all fours with the case at bar. In both cases shippers brought suit against motor common carriers on the basis of the same order of the Commission, *i.e.*, an order issued in a proceeding under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), directing the cancellation of increases in classifications of furniture on the ground that they were "not shown to be just and reasonable."

The Court of Appeals for the District of Columbia Circuit holds there, as the Court of Appeals for the Fifth Circuit held here, that a suit for restitution of monies the carriers collected under the increases during the period they were in effect does not lie.

Petitioners' principal claim in support of the issuance of a writ of certiorari is that the decision of the Fifth Circuit here is in conflict with the decision rationale of the Eighth Circuit in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (1970) cert. den., 402 U.S. 999 (1971). The Court of Appeals for the District of Columbia Circuit agrees with the Court of Appeals for the Fifth Circuit that there is no such conflict.

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BRYCE REA, JR.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1946

UNITED STATES OF AMERICA, APPELLANT

v.

ASSOCIATED TRANSPORT, INC. *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civ. No. 2003-71)

Decided October 1, 1974

Eloise E. Davies, Attorney, Department of Justice, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief, for appellant. *Morton Hollander* and *Thomas J. Press*, Attorneys, Department of Justice, also entered appearances for appellant.

Bryce Rea, Jr. for appellees.

Richard J. Hardy filed a brief on behalf of Mohasco Industries, Inc. as *amicus curiae* urging reversal.

Before WRIGHT, ROBINSON and MACKINNON, *Circuit Judges.*

PER CURIAM: The United States as a shipper sued the defendant motor carriers in the District Court for resti-

tution of excessive freight charges on furniture shipments made under published tariff rates which the Interstate Commerce Commission, following a formal investigation undertaken *sua sponte*, ultimately ordered set aside as not shown to be just and reasonable. The issue on this appeal is whether a shipper can sue an interstate motor common carrier for restitution of the excess of freight charges over just and reasonable rates, particularly in view of the express provision now made by the Motor Carrier Act of a remedy by way of reparations.[1] The focal inquiry is whether the saving clause of the Act[2] permits the judicially-conceived remedy of restitution to be used as the vehicle for recovery of such an excess. Our answer is in the negative.[3]

In *T.I.M.E., Inc.* v. *United States*,[4] the Supreme Court concluded that recognition, by virtue of the saving clause, of the common-law right to reparations[5] would be incompatible with the statutory scheme.[6] While the Court's opinion does not treat restitution, the discussion leaves no doubt that restitution would have met the same fate.[7] In 1965, however, following the decision in *T.I.M.E.*, Congress amended the Act to enable an aggrieved shipper

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[1] 49 U.S.C. § 304(a)(2) (1970). It should be noted that in cases wherein excessive rate-charging has been rectified by the process of restitution, a remedy leading to reparations has been conspicuously absent.

[2] 49 U.S.C. § 316(j) (1970).

[3] For answers from other appellate courts see *Mohasco Industries, Inc.* v. *Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir. 1974); *S. S. Kreske Co.* v. *A & B Transfer, Inc.*, —— F.2d —— (6th Cir., No. 72-1967, decided December 5, 1973).

[4] 359 U.S. 464 (1959).

[5] See *id.* at 472 n.12 and authorities there cited.

[6] *Id.* at 468-80.

[7] *Id.*

to recover reparations for unreasonable rates.[8] Although this remedy was readily available here, the Government ignored it in favor of a nonstatutory bid for restitution.

In support of its position on restitution, the Government relies primarily upon *Middlewest Motor Freight Bureau* v. *United States*.[9] There, after the Interstate Commerce Commission suspended—pending investigation—increased rates filed by truckers, the latter secured a temporary restraining order barring the suspension, thus enabling the higher rates to go into effect. The restraining order was later dissolved, but the District Court rejected the Government's plea for restitution for the higher freight charges it had paid while the order was in force. On appeal, the Eighth Circuit ruled that restitution should be allowed.

Nonetheless, a suit for restitution cannot be maintained for the purpose envisioned in the case at bar. In *Middlewest*, the carriers sought and obtained a judicial order restraining the Commission's suspension order, and the courts have traditionally awarded restitution upon dissolution of injunctive orders later found to be improvident.[10] No inconsistency with provisions of the Act or with the administrative process it mandates was promoted by allowance of restitution for rates higher than those which could have been charged had the Commission's suspension order gone into effect. As the court stated, restitution is the "proper remedy to return the parties to the position they would have been in had the Commission's order not been judicially restrained." [11]

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[8] 49 U.S.C. §§ 304(a)(2), (5) (1970).

[9] 433 F.2d 212 (8th Cir. 1970).

[10] *E.g.*, *Arkadelphia Co.* v. *St. Louis S. W. Ry.*, 249 U.S. 134, 145 (1935).

[11] *Middlewest Motor Freight Bureau* v. *United States*, *supra* note 9, 433 F.2d at 244.

By contrast, in our case restoration to the financial status quo is sought because the Commission refused to suspend the rate increases when filed by the carriers. It left the rates in effect while it proceeded with an investigation, and almost three years later it held that the rates had not been shown to be just and reasonable. The problem was thus generated by Commission—within the administrative process prescribed by the Act—rather than by judicial action outside of that process. And although the Act declares excessive rates to be unlawful,[12] Congress has now provided a procedure designed specifically for rectification of such excesses.[13] By virtue of the 1965 amendment, a shipper may challenge a carrier's rates before the Commission and, if successful, may recover reparations in court.[14] The frame and pre-amendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the past.[15] By the 1965 amendment, Congress has relented somewhat, but only to the extent of admitting the current reparations procedure.

There are fundamental differences, both in theory and in practice, between the doctrines of reparations and restitution as applied in situations involving excessive rates. In actions for reparations, shippers individually

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[12] 49 U.S.C. § 316(d) (1970). This provision does not, however, create a cause of action for allegedly unreasonable past rates, *T.I.M.E., Inc.* v. *United States, supra* note 4, 359 U.S. at 369-70. See also *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

[13] 49 U.S.C. §§ 304(a)(2), (5) (1970).

[14] *Id.* See also *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 355 I.C.C. 403, 406-07 (1969).

[15] *T.I.M.E., Inc.* v. *United States, supra* note 4, 359 U.S. at 368-80.

seek, as of right, damages measured by the exact difference between the charges paid and the just and reasonable rates.[16] Because any damages awarded are liquidated, it is necessary to know precisely what the just and reasonable rate was, and that determination can be made only by the regulatory agency.[17] Consequently, before a court can order reparations in favor of a shipper, the Commission must ascertain the just and reasonable rate.[18] Moreover, actions for reparations, which are "action[s] at law," [19] must be brought within specified periods of time.[20]

On the other hand, restitution rests essentially on the doctrine of unjust enrichment.[21] In rate cases, restitution ordinarily involves a refund for the benefit of all consumers subjected to the excessive rate, and the refund may be less than the amount of the excess for all consumers.[22] So it is that restitution may become available once it is known that the rate under scrutiny was excessive, without need to know just what a reasonable rate would have been.[23] And it would appear that a suit for restitution becomes time-barred, if at all, only as a result of laches.

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[16] See 49 U.S.C. § 304a(5) (1970).

[17] *T.I.M.E., Inc.* v. *United States*, *supra* note 4, 359 U.S. at 473; *Texas & Pac. R.R.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).

[18] See 49 U.S.C. § 304a(5) (1970); *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, *supra* note 14, 335 I.C.C. at 413.

[19] 49 U.S.C. § 304a(2) (1970).

[20] 49 U.S.C. §§ 304a(2), (8) (1970).

[21] *E.g.*, *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 134 U.S.App.D.C. 342, 364, 415 F.2d 922, 944 (1968), *cert. denied*, 393 U.S. 1081 (1969).

[22] *Id.*

[23] See *id.* at 361-67, 415 F.2d at 941-47.

These differences do not assist the Government, but rather accentuate its problem in the instant case. The Government bypassed the prescribed procedure for seeking reparations and brought instead what it considers a suit for restitution. Yet the Government demands exact damages, assumes the just and reasonable rate,[24] and remains insensitive to time limitations. In a word, the Government's approach seeks the best of both worlds.

As *Hewitt-Robins* [25] demonstrates, there are undoubtedly instances wherein the saving clause opens the door to restitution for violations of the Motor Carrier Act which are unrelated to the inherent reasonableness of rates.[26] But, in our view, to allow a shipper to substitute the nonstatutory remedy of restitution for the statutory mechanism of reparations is to insult the policy and scheme of the Act as interpreted in *T.I.M.E.*[27]

Affirmed.

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[24] In the rate investigation preceding the Government's suit, the Commission did not determine what the just and reasonable rate was, but only that the carriers' filed rates had not been proven to be just and reasonable. One of the controversies on this appeal is whether that is tantamount to a determination that the immediately preexisting rates were the just and reasonable rates.

[25] *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

[26] See also *Pensick & Gordon, Inc.* v. *California Motor Express, Ltd.*, 302 F.2d 391, 394 (9th Cir. 1962), *following remand*, 323 F.2d 769, 771 (1963), *cert. denied*, 375 U.S. 984 (1964).

[27] One facet of the inconsistency unavoidable in recognizing reparations and restitution as side-by-side remedies becomes apparent when it is realized that, with respect to a single rate which has been impugned, some shippers might sue for reparations while others might prefer to invoke restitution.